No. 95-489

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COLORADO REPUBLICAN FEDERAL
CAMPAIGN COMMITTEE and
DOUGLAS L. JONES, AS TREASURER

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit**

THE REPUBLICAN NATIONAL COMMITTEE'S BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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BRIEF *AMICUS CURIAE*

I. STATEMENT OF INTEREST AND SUMMARY OF THE ARGUMENT

The Republican National Committee ("RNC") is the "National Committee" of the Republican Party as that term is used in the Federal Election Campaign Act of 1971 ("FECA" or "Act"), 2 U.S.C. § 431(14).[1] Under the FECA, expenditures by the RNC "in connection with the general election campaign of any candidate for President of the United States" are limited to a certain sum. 2 U.S.C. § 441a(d)(2). Expenditures by the RNC and State Committees "in connection with the general election campaign of a

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[1] The RNC has filed this brief with the consent of all parties as reflected in letters lodged with the Clerk.

candidate" for Senator and Representative are similarly capped. 2 U.S.C. § 441a(d)(3).

The United States Court of Appeals for the Tenth Circuit, in its opinion below, construed the "in connection with the general election campaign of a candidate" language of 2 U.S.C. § 441a(d)(3) to cover "spending that involves a clearly identified candidate [of the other party] and an electioneering message, without regard whether that message constitutes express advocacy." *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1022 (10th Cir. 1995). The rule promulgated by the Tenth Circuit would apply limits on speech even though neither the political party speaking nor the opposing party whose potential candidate is mentioned have nominated their general election candidates.

This rule, if upheld, would place restrictions on any statement that mentions any incumbent President, Senator, or Representative by name unless the incumbent is not seeking or intending to seek reelection.

A political party exists in substantial part to promote the ideas of its members. Today, more so than ever before, a political party continually endeavors to communicate its message on current political issues. Such communication about political issues is central to our democracy and First Amendment protections for such speech are central to our constitutional system. Thus, the Tenth Circuit's rule would inhibit, constrain, and chill the RNC's rights of free speech to address the political issues of the day. This chilling of speech arises from the excessively vague and subjective standards for what may constitute an "electioneering message" concerning a clearly identifiable candidate. If the RNC desires to address substantive political issues but the FEC later deems the speech to be "electioneering" identified with a particular candidate, the RNC would be penalized by having its spending reallocated and/or deemed to be illegal later in the election cycle. The determination here occurred more than two years after the advertisement ran. Such determinations and penalties may well occur late in a hotly-

contested election and impair the RNC's ability to convey its message at a most critical time.

The burdens placed on the core First Amendment speech and associational rights of political parties by § 441a(d)(3) are unconstitutional because they do not rest upon compelling governmental interests nor on restrictions narrowly tailored to serve those interests. The same reasoning that led the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), to strike down Congress' attempt to limit the quantity of political discourse generally compels the same result when the limit is imposed only on a political party.

This Court has upheld FECA restrictions on political contributions because it determined such restrictions on actual or apparent *quid pro quo* relationships between donations and votes serve a compelling interest in combatting corruption or the appearance of corruption. However, when Congress adopted spending restrictions on political parties, it based its decision not on the corruption analysis underlying restrictions on individual contributions, but acted merely to close the presumed loophole in its constitutionally infirm scheme of comprehensively limiting political spending. Because this attempt to limit the totality of spending has been found to be unconstitutional, there is no justification for any restrictions on the speech of political parties. Certainly the attempts by the FEC and the Tenth Circuit to articulate how spending by political parties fits the *quid pro quo* corruption analysis fail. The Tenth Circuit in the face of this deficiency was compelled to base its decision in part on the misplaced assumption that incumbents control party spending, and that such a presumed advantage must be limited. 59 F.3d at 1024. Even if true, however, this concern represents an impermissible attempt to "level the political speech playing field" by limiting the totality of political speech. Because this impermissible policy of rationing speech underlies both § 441a(d)(3) and the opinion below, and because this policy choice is not a valid one under the First Amendment, much less a compelling interest, the opinion below must be reversed and § 441a(d)(3) declared unconstitutional.

Of course, the limitation on the quantity of political speech as voiced by political parties which is at issue here is also impermissible as a matter of statutory construction. Congress did not intend to burden the rights of political parties so sweepingly. The "in connection with" language was intended to limit the restrictions contained in the FECA, not to extend them to political speech throughout the election cycle as the Tenth Circuit would do.

II. ARGUMENT

A. 2 U.S.C. § 441a(d)(3) is Unconstitutional.

This case squarely presents the issue that the Court noted was not present in *Buckley*, whether the expenditure limitations imposed on political parties under the Federal Election Campaign Act of 1971, 2 U.S.C. § 441a, transgress the bounds of Congress's narrow power to limit freedom of speech and political association. *Buckley*, 424 U.S. at 58-59 nn.66-67. It is of compelling importance for the Court to reach this issue to complete the task, begun in *Buckley*, of freeing the exercise of core First Amendment freedoms from impermissible constraints intended to ration the amount of political discourse in our society.

The rights implicated here, freedom of speech and freedom to associate to express opinions on political issues and to influence the policies of government, are the most fundamental and precious rights in our democracy. 424 U.S. at 14. The discussion of political issues and unconstrained constitutionally protected debate on the positions and qualifications of candidates are integral to the operation of our system of government. *Id.* at 14-15. There has been, as this Court has noted, practically universal agreement that a major purpose of the First Amendment is to protect free discussion of government affairs and of the positions taken by candidates for office. The First Amendment has its fullest and most urgent application precisely in the area where § 441a(d)(3) seeks to limit the rights of political parties. *Id.*

> The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all." Mr. Justice Brandeis ... gave the principle its classic formulation:
>
> "Those who won our independence believed ... that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject....Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."
>
> Thus we consider this case against a background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open....
>
> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)(citations omitted).

Any scheme to restrict open and vigorous public debate of political issues and candidates' positions on them, no matter how well intentioned, necessarily strikes the most fundamental device for conducting the business of political parties. Where, as here, the restriction rests not on the government's laudable interest in preventing corruption, but instead upon Congress' desire to redistribute an arbitrarily quantified amount of political speech in the name of abstract

fairness, the restriction must fall. *See Buckley*, 424 U.S. at 48-49.

None of this is novel. It is merely a corollary of *Buckley*, and no new doctrine needs be established. Rather, it is well established that quantity restrictions on core political speech are invalid. 424 U.S. at 57. Nor has the Court failed to foreshadow what its conclusion should be. Since *Buckley*, the Court has continued to prune the Act's unconstitutional and unwarranted limitations on political advocacy. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*"); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985)("*NCPAC*"). Striking § 441a(d)(3) will merely complete a process long ago begun and do so by removing a limitation all the more egregious because it directly limits the political discourse of political parties, whose primary reason for existence is their exercise of First Amendment freedoms of political expression and association.

1. The Expenditure Restrictions Burden Core First Amendment Speech.

The restrictions on the total quantity of permissible party speech contained in § 441a(d)(3) are conceptually indistinguishable from the overall campaign expenditure limitations that the Court overturned in *Buckley*.

In *Buckley*, the Court considered constitutional challenges to a comprehensive campaign finance law affecting federal elections. The Act imposed limits both on the contributions that could be made to candidates and the total expenditures that candidates or anyone else could make in connection with a federal election.

The *Buckley* Court analyzed two interests advanced as sufficiently compelling to justify serious intrusions on fundamental rights. One, avoiding the corruption or the appearance of corruption, was found sufficient to justify limits on political contributions. 424 U.S. at 26. The Court

reasoned that the quantity of expression in a contribution was minimally diminished by limiting its amount. The essence of the expression is in the statement of support; how that expression was further reflected in the campaign involves speech by someone other than the contributor. *Id.* at 20-21.

The Court held that the contribution limitations do not inhibit in any material degree the potential for robust and effective political discourse among individuals, associations, the press, the candidates, and political parties. *Id.* at 28-29. Thus, the Court's analysis did not extend to the expenditure of contributed funds in political expression.

The other purported justification, levelling the playing field of political finance, was rejected. *Id.* at 48-49. In doing so, the Court held that no governmental interest suggested by the Act's defenders was sufficient to justify the restriction on the quantity of political expression imposed by campaign expenditure limitations. *Id.* at 55.

The Court also rejected any interest in equalizing the financial resources of candidates competing for federal office. Given the contribution limitation, the Court observed that the financial resources available to a candidate's campaign will likely reflect the size and intensity of his support. "There is nothing invidious, improper or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate." *Id.* at 56. In striking down the limitations, the Court concluded:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. at 57. The Court held that the expenditure limits considered in *Buckley* placed substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression, "restrictions that the First Amendment cannot tolerate." *Id.* at 58-59.

The expenditure limits applicable to political parties were not challenged on First Amendment grounds in *Buckley*. Therefore, the Court expressly noted that its sustaining of the party limitation against challenge was limited to the Fifth Amendment grounds presented. *Id.* at 58-59 nn.66-67. The pains that the Court took to draw the distinction and the sweeping and categorical language used by the Court in striking down the overall spending limits strongly suggested that the party limits suffered the same fatal infirmity.[2]

The FEC seeks to defend the quantity restrictions on parties by stating that those expenditures are deemed "contributions" under the Act. Party expenditures may be categorized as contributions for certain statutory purposes, but it is beyond question that for First Amendment analysis such expenditures are protected political speech. As such, party expenditures are no more subject to government-imposed limitations on quantity than "independent" expenditures, or overall expenditures. Here, of course, there was not even a known Republican nominee with whom to coordinate expenditures.

Nevertheless, the courts below have accepted uncritically the FEC's argument that all party expenditures in

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[2]The Court also observed that the Act's limitations on expenditures by campaign organizations and political parties would have required actual restrictions on the scope of a number of past congressional and presidential campaigns and would have constrained campaigning by candidates whose fundraising exceeded the ceiling. 424 U.S. at 20. Thus the burden of both limitations was seen to be real and direct. When it struck the overall limits, the Court did not differentiate the campaign limits from the party limits in terms of their effects.

connection with campaigns of their candidates are "coordinated" expenditures, and thus "contributions," not only for the purposes of 2 U.S.C. § 441a(a)(7)(b)(i) but for the purposes of First Amendment analysis. *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1452-53 (D.Colo. 1993); 59 F.3d at 1023-24. While the Court in *Buckley* recognized the effect of the statutory provision characterizing certain expenditures as contributions, 18 U.S.C. § 608(c)(2)(B), 424 U.S. at 47 n.53 (albeit different from 18 U.S.C. § 608(e)(1), the provision actually under challenge and construed in the opinion), the Court did not then nor has it subsequently held that party expenditures have diminished First Amendment protection. Yet that is the practical effect of the decision below.

2. Congress Did Not Purport to Restrict the Quantity of Party Speech to Combat Corruption but in a Misguided Effort to "Level the Playing Field" Through a Comprehensive Regulatory Scheme to Limit Political Spending.

The legislative history of the Federal Election Campaign Act demonstrates that Congress intended to strengthen political parties and to continue their prominent role in campaign finance.

> [A] vigorous party system is vital to American politics... Under the Committee bill, parties will retain their essential nonfinancial responsibilities in electoral politics. More important, the bill retains the role of political parties in private financing for federal candidates....[T]he Committee recognizes that pooling resources from many small contributors is a legitimate function and an integral part of party politics. Accordingly, the bill includes a special provision for private funding by political parties.

S. Rep. No. 689, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5593; *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 41 (1981) (§ 441a(d)(3) assures that political parties will continue to have an important role in federal elections).

The limitation that now appears in § 441a(d)(3) was one of a series of such limits adopted in 1976. Where political action committees could spend no more than $5,000 on behalf of a single candidate, a political party could spend proportionally to the voting age population in national, state or district.[3]

The Congressional debate in 1974 over amendments to the contribution and expenditure limits applicable to Republican and Democratic Senate and House campaign committees illustrates Congress' intent that political party committees be treated no differently from independent political committees in being subject to spending limits. Immediately before passage of his amendment restoring the limitations applied to political parties, Sen. Clark said:

> As it reported the bill, the committee said in effect that these "in-house" committees would be restricted exactly the same way as other political committees.... The committee's original judgment was correct. To permit unlimited expenditures would be a mistake.

120 Cong. Rec. 10060, 10063 (April 8, 1974).

The Court has struck down as unconstitutional the Act's limitation on independent expenditures by individuals in *Buckley*, by political committees in *NCPAC*, and by certain corporations in *MCFL*. Yet, political parties and their

[3]In a Senate race, for example, this might be as much as $2,121,450 in California, $406,500 in Tennessee, or $288,000 in Iowa. 120 Cong. Rec. 10060 (April 8, 1974). The limits are adjusted annually. 2 U.S.C. § 441a(c)(1).

committees remain subject to expenditure limits. To restore symmetry and coherence, the limits on political speech by political parties must be removed.

None of the Court's decisions since *Buckley* address the question of severability of the unconstitutional provisions. Congress intended political parties to be favored sources of campaign finance by granting them higher limits than independent committees. Yet the Court has invalidated the limits on practically all of the actors except political parties, thus rendering political parties uniquely disfavored, contrary to congressional intent.

The relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent of Congress without the unconstitutional provision. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). Congress did not intend to restrict political party expenditures when other expenditures were unlimited. The limits of § 441a(d)(3) are a relic of a scheme discredited by the Court's First Amendment analysis in *NCPAC* and *MCFL*. Moreover, the continuing limitation subverts Congress' intent that political parties play a significantly greater role proportionally than an individual or special interest group, as well as its intent to treat party and independent political committees alike by being limited by spending restrictions.

The Court has recognized that Congress may restrict political expenditures by certain business organizations because their financial situation is the result of economic power in the marketplace of commerce, not persuasive power in the marketplace of ideas. *MCFL*, 479 U.S. at 257-59. No similar restraint should apply to a political party, an organization that only exists in the political marketplace. As the Court said of the corporation in *MCFL*, a political party is formed to disseminate ideas, not to amass capital. *See id.* at 259. The resources that it has available are a not a function of its success in the economic marketplace, but its popularity in the political marketplace. Thus, no valid interest underlies the spending limits on political parties.

3. There is No Compelling Interest Sufficient to Justify Limiting Expenditures by Party Committees.

In *NCPAC*, the Court made clear that:

> preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.

470 U.S. at 496-7. Far from identifying any new or other legitimate and compelling government interest in this case, the Tenth Circuit simply identifies the same interests, but reaches the wrong result. What the Court stated in invalidating the Act's restrictions in *NCPAC* applies with equal or greater force to limitations on expenditures by political parties:

> But precisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

Id. at 498.

The Court struck down limitations on individual independent expenditures in *Buckley* and on independent political committee expenditures in *NCPAC* because it found no tendency in such "uncoordinated" expenditures to corrupt or give the appearance of corruption. *Id.* at 497. In contrast, the Court has upheld direct restrictions on expenditures by corporations, banks and labor unions, because their relative economic power may be no reflection of the power of their ideas, and may represent money improperly diverted from other sources. *See MCFL*, 479

U.S. at 258 (citing *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 423-24 (1972)).

The independent expenditures of individuals, political action committees, and corporations like *MCFL* are not limited, and cannot be limited constitutionally. In contrast, by administrative regulation, political parties are deemed incapable of making independent expenditures. 11 C.F.R. § 110.7(B)(4) (1981). All expenditures are deemed "coordinated".

As receivers of contributions and sources of expenditures, political parties are not distinguishable from the corporation in *MCFL*, which the Court held could not be restrained in its expenditures in support of candidates:

> Individuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money may ultimately be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use the funds in a manner that best serves the shared political purposes of the organization and contributor. In addition, an individual desiring more control over the use of his or her money can simply earmark the contribution for a specific purpose.... Finally, a contributor dissatisfied with how funds are used can simply stop contributing.

Id. at 260-61 (citations omitted). Nor are a party's fundraising activities distinguishable from NCPAC, whose

primary purpose was to attempt to influence directly or indirectly the election or defeat of candidates for federal, state or local offices by making contributions and its own expenditures. 470 U.S. at 490. The Court rebuffed the FEC's attempt to regulate NCPAC and FCM, rejecting the notion that the PACs' form of organization or method of solicitation diminished their entitlement to First Amendment protection. *Id.* at 494.

Clearly, political parties in their advocacy role are like the corporation in *MCFL*, the political action committees in *NCPAC*, and the individuals in *Buckley* and not like the banks, unions and business corporations that Congress and the Court have consistently found to pose risks of corruption.

While political parties are more like the unregulated special interest groups, they are also distinctive in the numbers and breadth of their membership and the diversity of views and interests represented. Political parties differ from other interest groups in the extent to which parties pursue their organizational activities through contesting elections; the breadth and inclusiveness of the party organization and membership; the sole concentration of parties on political activities for achieving their goals; and their strength as reference symbols for the electorate. Kirk T. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L.REV. 53, 98 (1987) (citing F. SORAUF, PARTY POLITICS IN AMERICA 15-18 (5th Ed. 1984)). These characteristics distinguish political parties from special interest groups. By their nature, political parties are less susceptible to *quid pro quo* corruption than special interest groups. Nevertheless, political parties are more strictly regulated than such groups. There is simply no justification for regulating political party expenditures, whether coordinated or independent, more strictly than those of special interest groups.

4. The Policy Against *Quid Pro Quo* Donations is Not Implicated by Political Party Expenditures.

Only the *quid pro quo* corruption analysis has been recognized by the Court as sufficiently compelling to justify regulation of the basic First Amendment Rights implicated here. *NCPAC*, 470 U.S. at 496-97.

Even under the broadest formulation, a political party's expenditures in support of its candidates cannot be fitted into the *quid pro quo* model. Indeed, in our current issue-dominated political culture, a party's espousement of ideas is a critical dynamic in our electoral system, even leading some officeholders and candidates to change political affiliation.

Voters may properly expect a party's candidates to support and advocate the positions of the party. Increasing the level of party support reinforces party identity. It is impossible for a political party to corrupt its own candidates in the sense defined by the Court. Nahra, 56 FORDHAM L.REV. at 105-06. The candidate's adherence to the party's positions, even if influenced by financial support, is not corruption. *Id.* (citing *NCPAC*, 470 U.S. at 498). Far from "corrupting" the candidate, this encourages increased candidate loyalty and responsiveness to the party, which tends to free the candidate from the need to rely on the financial support of special interest groups. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1912 (1995) (Thomas, J., dissenting) (stating that scholars believe campaign finance laws give large financing role to entities with incentives to curry favor with incumbents); *NCPAC*, 470 U.S. at 517 n.12 (White, J., dissenting) (observing that the system of campaign financing virtually forces Members of Congress to beg money from special interest groups and political action committees whose sole purpose for existing is to seek a *quid pro quo*).

Thus, the *quid pro quo*, if any, in party-candidate relations is closer identity between the positions of the party

and those of its candidates. The natural result is diminished reliance on the very contributions where the *quid pro quo* may produce undesirable results.

Contributions to political parties are restricted in size under the Act, 2 U.S.C. § 441a(a)(1). Contributions made to and reported by the party are free of the taint of *quid pro quo*. The party's expenditure of funds in pursuit of its goals, not as symbolic contributions but as protected political expression, cannot be hobbled by expenditure limitations that impermissibly restrict the rights of political associations to engage in protected political expression. *See Buckley*, 424 U.S. at 58-59.

5. The Application of 2 U.S.C. § 441a(d)(3) by the Court Below is Unconstitutional Because It is a Restriction on Political Speech Based on Content.

The application of the expenditure limitation by the court below is unconstitutional on the additional ground that it regulates political speech based on content. The advertisement concerning then Congressman Wirth was a violation of the Act *only* because of its content, specifically, its identification of a "candidate" and its "electioneering message" as subjectively determined by the FEC. 59 F.3d at 1022-23. Other advertisements by the identical entity, differing only in their failure to mention Wirth's senatorial aspirations, were never challenged by the FEC. App. 93a-98a, 100a-105a.

The Court applies the most exacting scrutiny to regulations that suppress, disadvantage or impose differential burdens on speech based on its content. *Turner Broadcasting Sys. v. FCC*, 114 S.Ct. 2445, 2459 (1994). "[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.*; *see, e.g., Boos v. Barry*, 485 U.S. 312, 318-21 (1988).

By no stretch of reasoning can the advertisement here survive strict scrutiny. No risk of a corrupt *quid pro quo* exists, particularly where there was no Republican candidate yet selected who could benefit from the expenditure, and no basis thus exists for content-based regulations under the law.

B. If § 441a(d)(3) Were Constitutional, It Would Restrict Only Express Advocacy Regarding Voting in a General Election.

Even if the Act were otherwise constitutional, it would be necessary to interpret the "in connection with" requirement of § 441a(d)(3) narrowly and to adopt the "express advocacy" standard applied to this precise language in other provisions of the Act. *Buckley*, 424 U.S. at 41-45.

The First Amendment protects the speech and associational rights of political parties. Indeed, as Congress observed in adopting the FECA, one "crucial function" political parties serve in an election is to "publiciz[e] issues." S. Rep. No. 689, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5594. This kind of core political speech involving "[d]iscussion of public issues and debate on the qualification of candidates" lies at the heart of the First Amendment and is entitled to "the broadest protection." 424 U.S. at 14.

Rather than interpreting the "in connection with" language of § 441a(d)(3) narrowly in an attempt to minimize constitutional challenges by requiring "express advocacy," the FEC and the Tenth Circuit have construed it broadly to require only a "clearly identified candidate" and an "electioneering message." 59 F.3d at 1622. The challenged advertisement in this case merely identified a candidate and discussed his stance on defense issues. (App. 104a-105a).

By eschewing a bright line embracing the narrow interpretation of the statutory text embodied in the "express advocacy" standard, and instead deciding in favor of the malleable standard the FEC favors in this case, the court of

appeals (1) disregarded this Court's prior interpretation of the same "in connection with" language in a related section of the Act which has been held to require "express advocacy;" (2) contravened Congress' intent to favor political parties in connection with spending limits; and (3) improperly deferred to inconsistent agency interpretations of the statute contained in two of three non-binding advisory opinions.

1. The Tenth Circuit Should Have Read § 441a(d)(3) in a Manner Consistent with This Court's Interpretation of Identical Language From the Same Act.

The Committee's expenditure at issue is not subject to the limitations imposed by § 441a(d)(3) unless the expenditure was made "in connection with the general election campaign." In *MCFL*, this Court previously interpreted the identical statutory language in the context of § 441b of the Act. This Court ruled that an expenditure "must constitute 'express advocacy' to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249. The Court, applying *Buckley*, reasoned that a narrow interpretation of the statutory language would better protect core First Amendment speech. *See id; Buckley*, 479 U.S. at 41-44. Applying *MCFL*, the district court here correctly interpreted the phrase "in connection with the general election campaign" to mean that an expenditure must involve "express advocacy" in order to be subject to the restrictions of § 441a(d)(3). 839 F. Supp. at 1453-54. The district court applied *MCFL* to § 441a(d)(3) because §§ 441a(d)(3) and 441b had similar purposes. Following well-established rules of statutory construction, the district court gave the phrase "in connection with the general election campaign" the same meaning in § 441a(d)(3) as it had in § 441b. *Id.* at 1453.

To establish a more broad application, the Tenth Circuit held that Congress intended to ascribe a different meaning to § 441a(d)(3) because the words were found "in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with

different intent." 59 F.3d at 1020. The court of appeals then ruled that § 441a(d)(3) regulated expenditures that both depicted a clearly identified candidate and conveyed an electioneering message. *Id.* at 1022.

It is well-settled that in instances where different parts of the same act have similar purposes, this Court assumes that identical words used in different parts of the same act are intended to have the same meaning. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578, 2591 (1993); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

Both §§ 441(b) and 441a(d)(3) were intended to regulate the expenditures of multi-person organizations. More importantly, both sections were adopted in an attempt to comprehensively regulate contributions and spending. Because political parties compete not in the marketplace for money but in the marketplace of ideas, § 441a(d)(3) if anything, should be more narrowly construed than § 441(b).

The Tenth Circuit's opinion also misread the Court's reservation of the present question in *Buckley*. 59 F.3rd at 1020-21. The Court's discussion of political party expenditures at note 67 accepted, but did not validate, the treatment of party expenditures as "coordinated" expenditures because the issue was not before the Court for First Amendment analysis. *Buckley*, 454 U.S. at 59 n.67. Thus, the Tenth Circuit's reliance on this note is misplaced.

The lower court's only other basis to ignore established rules of statutory construction is what the opinion terms "some evidence" of congressional intent. 59 F.3rd at 1021. Given the core First Amendment rights at issue, the Tenth Circuit's reasoning on the rule of statutory construction relied upon by the district court is clearly erroneous.

2. The Commission's Construction of § 441a(d)(3) as Regulating Political Committee Expenditures Depicting a Clearly Identified Candidate and Conveying an Electioneering Message is Not a Construction to Which This Court Must Defer.

The court of appeals ruled that it was compelled to adopt the FEC's interpretation of § 441a(d)(3) because the Commission's construction of the statute was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As *Chevron* and its progeny make clear, however, "the courts are the final authorities on issues of statutory construction, and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions . . ." *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (quoting *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968)) (citations omitted); *see Chevron*, 467 U.S. at n.9. The Tenth Circuit's deference to the FEC's interpretation of § 441a(d)(3) is wholly unwarranted because the Commission's present interpretation of this statute is (1) not consistent with prior FEC rulings and (2) contrary to Supreme Court precedent and the Constitution.

The FEC initially adopted the "express advocacy" reading of § 441a(d)(3). 59 F.3d at 1022 n.7 (citing FEC Advisory Opinion, 1978-46, Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5348 (Sept. 5, 1978)). In two subsequent advisory opinions, however, the FEC adopted its current construction of the statute. *Id.* at 1021-22. The court of appeals ruled that notwithstanding the FEC's change in interpretation, it was required to give the FEC's current view deference. *Id.* at 1022 n.7 (citing *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991)). *Rust* held, however, that this change in interpretation must be justified by "a reasoned analysis." *Rust*, 500 U.S. at 187 (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

This Court should examine the thoroughness, validity and consistency of the Commission's interpretation of § 441a(d)(3) in determining the amount of deference to give the Commission's construction of the statute. *Sloan*, 436 U.S. at 117-18; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978). The two Commission rulings on which the Tenth Circuit purported to rely upon fail to explain the FEC's justification for changing its construction of § 441a(d)(3). Because this Court only can speculate about the Commission's reasons for changing its interpretation of the statute, deference is not warranted. *See Sloan*, 436 U.S. at 118; *see also State Farm*, 463 U.S. at 43. Indeed, it was this lack of consistency and thoroughness which prompted the district court to discard the Commission's interpretation of the statute. 839 F. Supp. at 1455.

Additionally, the FEC's interpretation of § 441a(d)(3) is not entitled to deference under *Chevron* if it is inconsistent with the Supreme Court's interpretation of the statute or the Constitution. *See Lechemere, Inc. v. NLRB*, 112 S. Ct. 841, 847 (1992) (quoting *Maislyn Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)). As explained above, this Court previously has interpreted the phrase "in connection with any election" to mean "express advocacy" in the context of § 441b.[4] *MCFL*, 479 U.S. at 248-49. Similarly, in *Buckley*, the Court construed a restriction on expenditures "relative to clearly identified candidates" as restricting expenditures involving "express advocacy." *Buckley*, 424 U.S. at 41-42. The FEC has ignored this precedent in interpreting § 441a(d)(3) to reach expenditures that depict a clearly identified candidate and convey an electioneering message. Furthermore, the Commission's broad interpretation of the statute is inconsistent with the Constitution because it impermissibly infringes upon the First

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[4]It is noteworthy that every lower court interpreting the phrase "in connection with" as it is used in the Act has ruled that it means "express advocacy." *See, e.g., Faucher v. FEC*, 928 F.2d 468, 470-72 (1st Cir.), *cert. denied sub. nom.*, 502 U.S. 820 (1991); *Orloski v. FEC*, 795 F.2d 156, 166-67 (D.C. Cir. 1986).

Amendment rights of political parties. *See supra* at pp. 6-16; *see also MCFL*, 479 U.S. at 249; *Buckley*, 424 U.S. at 41-44.

III. CONCLUSION

This Court should declare the limits contained in § 441a(d)(3) of the Act unconstitutional consistent with its prior rulings striking down spending limits by other political advocates. It should also interpret the operative language consistently with its construction of the same language elsewhere in the Act.

Respectfully submitted,

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